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No. 03-1243

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Supreme Court of the United States

IN RE GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.

On Petition for a Writ of Mandamus to the Supreme Court of South Carolina

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

Respondents do not dispute that if this Court, in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), held that the arbitration awards had been entered in violation of the Federal Arbitration Act ("FAA"), the South Carolina Supreme Court would have been compelled on remand to set those awards aside as a matter of federal law. Instead, the entirety of Respondents' Opposition to the Petition for Mandamus ("Opp.") depends upon their assertion that "this Court did not hold that the arbitration awards violated the FAA," Opp. 2, and merely "remanded for further proceedings to *clarify* the arbitrator's decision," *id.* at 6 (emphasis added). That position is demonstrably wrong.

In its decision last Term, this Court vacated a judgment of the South Carolina Supreme Court that affirmed the class-wide arbitral awards entered in the *Bazzle* and *Lackey* proceedings. Pet. App. 12a. This Court vacated the South Carolina Supreme Court's judgment because, after canvassing the record, it concluded (in a holding studiously avoided by respondents), that "[w]ith respect to this underlying question—whether the arbitration contract forbids class arbitration—the parties have not yet obtained the arbitration decision that their contracts foresee." *Id.* at 11a. Because Green Tree had not received the arbitrator's decision mandated by the FAA, this Court vacated the judgment below and remanded "the case so that the arbitrator may decide the question of contract interpretation—thereby enforcing the parties' arbitration agreements according to their terms." *Id.* at 12a (citing 9 U.S.C. § 2 and *Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79 (1989)).

In an effort to avoid this clear holding, respondents must rewrite this Court's decision. Contrary to their argument, this Court did not remand "for further proceedings to *clarify* the arbitrator's decision." Opp. 6 (emphasis added). Rather, it

vacated the judgment affirming the arbitral awards because the parties' agreements had not been enforced in accordance with their terms and remanded so that "the arbitrator may decide the question of contract interpretation." Pet. App. 12a.

More fundamentally, respondents' position that this Court vacated the South Carolina Supreme Court's judgment *without* concluding that the underlying class-wide arbitral awards violated federal law is directly contrary to settled law explicating the power of this Court to review state court judgments. As this Court explained long ago: "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions." *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945); accord *Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985); *Ridgway* v. *Ridgway*, 454 U.S. 46, 54 (1981). That is, this Court could not have set aside the state-court judgment affirming arbitral awards *unless* it determined that those arbitral awards were entered in violation of the FAA. That, of course, is precisely what this Court held in ruling that the parties' agreements had not been enforced in accordance with their terms. Pet. App. 11a, 12a.

In reaching that conclusion, this Court rejected respondent's argument – which they repeat here – that the arbitrator independently made the necessary predicate class-action determinations. In *Bazzle*, this Court relied upon the South Carolina Supreme Court's ruling that "the '*trial court*' issued 'an order granting class certification'" and rejected respondents' denial of that conclusion because it could "find no convincing record support for that denial." Pet. App. 11a (emphasis added). In *Lackey*, the Court noted that the record was "less clear" than in *Bazzle*, but ultimately held that, as to both proceedings, "the parties have not yet obtained the arbitration decision that their contracts foresee." *Id.*[1]

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[1] Respondents seek to reargue this point by insisting that this Court's holding was contrary to arguments made below by Green Tree. Opp. 5

Further, the fact that there could be further proceedings in the state courts does not render mandamus relief "premature." Opp. 14. To the contrary, when a party has been denied the benefit of this Court's mandate, that party need not "go through that entire process again to obtain execution of the judgment of this Court." *General Atomic Co.* v. *Felter*, 436 U.S. 493, 497 (1978) (per curiam).

Nor has the need for mandamus relief been rendered "moot," Opp. 14, merely because the arbitrator has denied Green Tree an opportunity to present its position and instead rubber-stamped a proposed order submitted by respondents that repeats the same arguments rejected by this Court. Without mandamus relief, Green Tree may be obligated to pay more than $8 million in post-judgment interest on arbitral awards that it challenged and that this Court held were entered in violation of the FAA. Pet. App. 11a, 12a. Vacatur of the arbitral awards would do away with any claim to post-judgment interest and further would require respondents to obtain and confirm new judgments before they could seek recovery from the bankruptcy estate. Opp. 3, 11. Respondents seek to avoid that result, but provide no reason that they should be exempt from the execution of this Court's mandate or from the operation of the bankruptcy laws.

Neither respondents nor the court below can justify their refusal to enforce this Court's mandate by arguing that it would "be antithetical to the actual result intended by the arbitrator and the state courts in this protracted litigation." Opp. 14. Federal law controls. And, as explained by this

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n.2. In doing so, respondents ignore that, in the court below, they argued that the "Trial Court" in *Bazzle* "applied state law when determining class certification and class arbitration." Final Br. of Resps., at 18, *Bazzle* v. *Green Tree Fin. Corp.*, Case No. 00-CP-18-443 (S.C. filed Dec. 3, 2001). And, in *Lackey*, as this Court noted, respondents argued that "'to the extent' the arbitrator decided that the contracts permitted class procedures . . . 'it was a reaffirmation and/or adoption of [the *Bazzle* c]ourt's prior determination.'" Pet. App. 12a (alteration in original).

Court, the class-wide awards violated the FAA because they were entered without a determination by an arbitrator that the parties' contracts permitted class-wide arbitration. Pet. App. 11a, 12a. Refusal by the court below to vacate those awards violates this Court's mandate and warrants mandamus relief.

I. A WRIT OF MANDAMUS IS NECESSARY TO ENSURE COMPLIANCE WITH THIS COURT'S MANDATE.

Respondents nowhere dispute that mandamus relief is proper where a lower court "does not proceed to execute the mandate, or disobeys and mistakes its meaning." *United States* v. *Fossatt*, 62 U.S. (21 How.) 445, 446 (1858); see also *General Atomic*, 436 U.S. at 497. Respondents argue instead that the South Carolina Supreme Court was not obligated "to vacate the arbitral awards and lower court judgments confirming them," Opp. 10, because this Court's mandate only required "further proceedings to clarify the arbitrators' [sic] decision," *id.* at 6; see also *id.* at 10, 12. As a result, they insist that the court below fulfilled this Court's mandate when it refused to vacate the arbitral awards and "submitted the matter to the arbitrator for clarification." *Id.* at 10. These arguments cannot be reconciled with this Court's holding.

This Court's decision did not seek "clarification" of anything. Instead, this Court vacated the South Carolina Supreme Court's decision affirming the class-wide arbitral awards at issue in this case. Pet. App. 12a. It did so because, on the predicate issue whether the parties' contracts permitted class-wide arbitration, the Court concluded, point blank, that "the parties have not yet obtained the arbitration decision that their contracts foresee." *Id.* at 11a. As a result, this Court remanded the case not for "clarification," as respondents argue, Opp. 6, 10, but "so that the arbitrator may decide the question of contract interpretation," Pet. App. 12a.

This Court explained that its ruling was compelled by the FAA, which requires that "parties' arbitration agreements" be

enforced "according to their terms." Pet. App. 12a. Only by ignoring that holding can respondents claim that there is "no rule of law . . . that clearly and indisputably establishes [Green Tree's] right" to vacatur of the arbitral awards. Opp. 12. Simply put, this Court vacated the judgment below because the class-wide arbitral awards violated the FAA, which requires that "arbitration agreements" be enforced "according to their terms," Pet. App. 11a.

Respondents suggest that this Court did not hold that "the arbitration awards" were "entered in violation of the FAA." Opp. 17. Indeed, respondents insist that "[t]his Court made no such holding, nor could it." *Id.* That argument is wrong not only because it ignores this Court's decision, but also because it fails to recognize this Court's limited authority over state-court judgments. As explained by Justice Jackson, the Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights"; that is, the Court's "power is to correct wrong judgments, not to revise opinions." *Herb*, 324 U.S. at 125-26 (citing cases); accord *Ake*, 470 U.S. at 75; *Ridgway*, 454 U.S. at 54; *Zacchini* v. *Scripps-Howard Broad. Co.*, 433 U.S. 562, 566 (1977). As a result, this Court's only authority to set aside the state court's judgment affirming the class-wide arbitral awards was based upon the conclusion that the arbitral awards violated federal law as set forth in the FAA. Pet. App. 11a-12a. Put another way, absent a determination that the arbitral awards were entered in violation of the FAA, this Court would have been without authority to vacate the South Carolina Supreme Court's judgment affirming those awards.

Finally, respondents contend that the "absence in this Court's mandate of any direction to the state high court to vacate the underlying judgments is dispositive here." Opp. 13. That argument, however, is simply a variation on respondents' misreading of this Court's opinion. The mandate expressly incorporates this Court's opinion, and that

opinion held that the arbitral awards were contrary to the requirements of federal law as reflected in Section 2 of the FAA. Pet. App. 11a-12a. Because the arbitration awards violated the FAA, the South Carolina Supreme Court was not entitled, either as a matter of "discretion" or "administration of its own courts" to refuse to give effect to this Court's determination that federal law had been violated. Thus, mandamus is necessary not for the purpose of "micro-managing" the state courts, but to ensure that this Court's mandate is given its full effect. See *General Atomic*, 436 U.S. at 496; *Fossatt*, 62 U.S. (21 How.) at 446.

II. A WRIT OF MANDAMUS IS BOTH TIMELY AND APPROPRIATE TO PROTECT THE RIGHTS OF GREEN TREE UNDER THE FAA.

Respondents' argument that mandamus relief should be denied because it would be both "premature" and "moot," Opp. 14, does not withstand scrutiny.

1. There can be no question that mandamus is not "premature." On remand from this Court, Green Tree sought enforcement of the mandate by explaining to the South Carolina Supreme Court that the arbitral awards at issue in these proceedings violated the FAA and must be vacated. In its February 20, 2004 decision, the South Carolina Supreme Court questioned whether Green Tree had "prevailed" in this Court, declined to follow an unbroken line of its own precedent, and refused to vacate the judgments confirming the arbitral awards. Pet. App. 3a.[2] Respondents contend that mandamus is premature because the South Carolina courts

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[2] Even though this Court vacated the lower court judgment that they sought to defend, respondents too suggest that Green Tree did not prevail because this Court did not accept all Green Tree's positions. Opp. 4. In doing so, respondents ignore that the Court, through Justice Breyer, expressly rejected their contention that the arbitral awards were consistent with the FAA because the arbitrator had actually determined that the parties' agreements authorized class-wide arbitration. Pet. App. 11a.

have not "complete[d] their proceedings," Opp. 16, and thus the request for mandamus "is an apparent attempt to circumvent the normal appellate process," *id.* at 15.[3]

This Court, however, has rejected this very same argument in *General Atomic*, 436 U.S. at 497. There, this Court explained that "[a] litigant who . . . has obtained judgment in this Court after a lengthy process of litigation, involving several layers of courts, should not be required to go through that entire process again to obtain execution of the judgment of this Court." *Id.* Under *General Atomic*, Green Tree should not be required to run through an entire round of appeals to obtain execution of the mandate to which this Court ruled Green Tree was entitled.

Respondents' efforts to distinguish *General Atomic* are specious. Respondents contend, in vague generalities, that *General Atomic* involved a state court that was "acting beyond its constitutional authority in contravention of an earlier mandate" and that "[t]here is no similar error here." Opp. 14. At issue in *General Atomic* was an effort by a litigant to secure its rights to have an arbitration in accordance with "the arbitration clause" in its agreement as guaranteed by the Federal Arbitration Act. 436 U.S. at 494. The refusal of the state court to allow that federally protected arbitration violated the FAA and therefore was contrary to the Supremacy Clause. *Id.* at 496-97. Like *General Atomic*, in this case, the South Carolina Supreme Court's refusal to vacate arbitral awards that this Court explained were entered in violation of the FAA fails to give effect to this Court's mandate and denies Green Tree its rights under the FAA.

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[3] Respondents do not suggest that Green Tree can obtain relief from the lower courts. Indeed, the South Carolina Supreme Court recently denied Green Tree's request for a stay pending this Court's resolution of the petition for mandamus. Further, the trial court in *Lackey* ordered that the superseadeas bond securing the original judgment be paid out after that court refused to allow Green Tree an opportunity to show that this Court's decision vacated the judgment entered in the *Lackey* proceeding.

2. Respondents also are wrong in suggesting that the petition for mandamus is somehow "moot," Opp. 14, because the "arbitrator has now made unmistakably clear that it was, and is, his own independent view that the clause permits class arbitration," *id.* at 10.

First, there can be no question that the petition for mandamus has not been rendered "moot" by the arbitrator's rubber-stamp of respondents' proposed order. Opp. 14. As Green Tree explained previously, the lower court's refusal to vacate the arbitral awards has dire, real-world consequences for Green Tree. Pet. 21. Indeed, after Green Tree posted multi-million dollar bonds so that it could challenge the judgments confirming these arbitral awards and after prevailing before this Court in establishing that these arbitral awards violated the FAA, respondents argue that these invalid arbitral awards should be kept in place by pretending that this Court's decision never occurred.

To be sure, after concluding that the original arbitral awards were entered in violation of the FAA, Pet. App. 11a, this Court remanded for further proceedings in which "the arbitrator may decide the question of contract interpretation." *Id.* at 11a, 12a. At most, that would allow the arbitrator to issue "new" arbitral awards based upon his view of what the parties' agreements require. Thereafter, respondents could seek to confirm those awards and thereby convert them into enforceable judgments, see 9 U.S.C. § 9, while Green Tree might seek to vacate those awards, *id.* § 10. Respondents struggle to avoid the normal operation of the FAA – which the parties expressly agreed would govern their agreements to arbitrate, Pet. App. 6a – because respondents would not be entitled to recover the more than $8 million dollars of post-judgment interest that has accrued on arbitral awards that this Court ruled were invalid under the FAA.[4]

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[4] Respondents argue that their agreements incorporate only the definitional section of the FAA, 9 U.S.C. § 1, but not its substantive

What is more, respondents acknowledge that if they are required (and able) to convert new arbitral awards into new judgments, those judgments will not be secured by existing bonds, and therefore they will need to seek payment through the bankruptcy court. In this regard, respondents nowhere explain why they should be exempted from the operation of the bankruptcy laws. And they never explain why their claims for statutory damages (for which there was no showing of *actual* damage) and their multi-million dollar attorneys' fees awards (which translate to more than $900 for every attorney hour) should be preferred over the claims of other creditors seeking recovery from the bankruptcy estate.

Finally, it is simply not the case that "if petitioner were successful in obtaining vacatur, the arbitrator's [most-recent] decision would compel [their] immediate reinstatement" of the vacated judgments. Opp. 11. Any new arbitral award would be subject to judicial scrutiny *before* it could become an enforceable judgment. 9 U.S.C. § 10(a). Recognizing that arbitral awards can be vacated where there is "evident partiality or corruption," *id.* § 10(a)(2), respondents argue that the arbitrator's initial effort to enter an order on their behalf in direct violation of a bankruptcy court stay was excusable because Green Tree did not inform the arbitrator of the stay. Opp. 7 n.4. That is false. Green Tree expressly told the arbitrator "that the automatic stay is still in place and that any efforts to pursue a claim against the Debtor in bankruptcy constitutes a violation of that stay." Letter from Herbert W. Hamilton to Thomas J. Ervin, Arbitrator (faxed on Aug. 11, 2003). Despite that notice, the arbitrator violated the stay so

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provisions, *id.* §§ 2-16. Opp. 18 & n.11. They offer no explanation to justify that absurd construction and ignore that their argument was rejected by the South Carolina Supreme Court in a decision they never cross-petitioned to challenge. *Bazzle* v. *Green Tree Fin. Corp.*, 569 S.E.2d 349, 355 n.9 (S.C. 2002). Indeed, the South Carolina Supreme Court applied Section 10 of the FAA to assess Green Tree's original challenge to the arbitral awards. *Id.* at 361.

that he could adopt respondents' initial proposed order. Pet. 8-10.

Recognizing that arbitral awards also can be vacated where the arbitrator refused to hear evidence, 9 U.S.C. § 10(a)(3), respondents must argue that Green Tree "had an opportunity to be heard before the arbitrator" but "had nothing new to say." Opp. 15 n.7. That again is false. Green Tree informed the arbitrator that it opposed "entry of the proposed Order" submitted by respondents and requested a "conference call for the purpose of establishing a schedule for briefing, a hearing, and any related proceedings" on remand from this Court. Letter from B. Rush Smith III to Thomas J. Ervin, Arbitrator (faxed Feb. 23, 2004). At this conference call, the arbitrator thumbed his nose at this Court's remand by informing Green Tree that there would be no further proceedings, and, within the hour, faxed his most-recent adoption of respondents' proposed "nunc pro tunc" order to the South Carolina Supreme Court.

Finally, Green Tree would be entitled to challenge the arbitrator's wholesale "nunc pro tunc" adoption of the arguments – at the insistence of respondents – that the arbitrator previously had decided the class-action issue in the *Bazzle* and *Lackey* proceedings. Pet. App. 20-22a (Supplemental Order in Arbitration). Of course, this Court already has ruled, after reviewing the same record evidence and the prior decision of the South Carolina Supreme Court, that "the parties have not yet obtained the arbitration decision that their contracts foresee." Pet. App. 11a.

Because this Court ruled that the class-wide arbitral awards violated the FAA, Pet. App. 11a, 12a, and because the lower court has refused to vacate those awards, *id.* at 3a, mandamus is necessary to enforce this Court's mandate.

CONCLUSION

For these reasons, and those set forth in the petition, a writ of mandamus should be granted.

Respectfully submitted,

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